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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107



SDMS DocID 2226896

SUBJECT: Malvern TCE Site/VRS Challenge of Armstrong
World Industries, Inc.

DATE: 11/18/97

FROM: Joan A. Johnson

TO: Malvern File

1. 9/3/97 VRS ranking of Armstrong

Drums all years: 575
Drums up to 8/1/75: 0

Percentage all years: 1.8643%
Percentage up to 8/1/75: 0

2. Challenge dated October 6, 1997

EPA attributed 575 drums of waste to Armstrong. Armstrong claims that the actual number of drums attributable to Armstrong should be reduced to 312.14.

A. Harm should be apportioned using August 1, 1975 as the dividing line.

Armstrong contends that remedial costs at the Site may be apportioned between the two distinct areas of contamination at the Site, consistent with the model set forth under the Restatement (Second) of Torts and Superfund divisibility cases.

EPA has determined that remedial costs may be apportioned between the Former Disposal Area and the Main Plant Area. Such apportionment may occur for purposes of determining de minimis settlement offers. PRPs may further apportion liability as between themselves.

B. 50-Gallon drums

Armstrong contends that the drums from Armstrong to Chemclene were not full, but rather each drum contained 50 gallons of material. Thus, according to Armstrong, its volume should be reduced from 575 to 522.73.

It appears from the Armstrong transaction records that Armstrong's challenge in this regard is correct.

C. Non-solvent materials

Armstrong contends that the number of drums attribute to Armstrong should be further reduced to 312.14 because the drums shipped to Chemclene contained significant volumes of non-solvent materials. Specifically, Armstrong claims that Chemclene's Reclamation Reports that are tied to each transaction specify the percentage of solvent reclaimed in each shipment. Thus, according to Armstrong, it is possible to calculate the volume of material other than solvent that was contained in any shipment of drums from Armstrong to the Site. This non-solvent volume should be subtracted from the total gallons of materials shipped in a particular batch.

In preparing the VRS, EPA has counted for each PRP all waste, including mixed waste, into the Site. EPA has presumed that contamination at the Site resulted from storage and/or processing of waste that included hazardous substances, into the Site. No discount has been provided by EPA based upon reclaimed solvents. Likewise, EPA has not attempted to subtract from the VRS non-solvent waste that was mixed in with hazardous substances shipped to the Site. Insufficient information is available to permit EPA to discount with any consistency among Site PRPs volume on this basis.

D. Owner/operator/transported liability and orphan share

Armstrong contends that EPA should state clearly that any liability to be derived from the VRS, or any future revised ranking, is secondary to the liability of Chemclene.

Typically, owner/operators are not among entities ranked in VRS. EPA, however, views Chemclene as a Site PRP that ought to participate substantially in Site remediation.

Armstrong contends that usage of the Site during the period from 1952 to 1968 should be determined and treated by EPA as an orphan share.

Any attempt to calculate an orphan share based upon the 1952 to 1968 time period would be highly speculative. It is reasonable to assume that a number of financially viable PRPs that utilized Chemclene post-1968, also utilized that Site during the 1952 to 1968. Under such circumstances, calculation of an orphan share may be inappropriate.

3. Recommendation

It is recommended that the VRS ranking for Armstrong reduced from 575 drums to 522.73 drums, based upon information indicating that Armstrong sent 50-gallon/drums to the Site.

Malvern TCE Superfund Site: Comprehensive Transaction Report

Run Date: 9/19/97

PRP Name: Armstrong Cork Co.

Transaction Date	Order Number	Invoice Number	Material Number	Waste Description	Quantity	Control Method Ranking
1/19/78	36673		NA	TRICHLOROETHANE	11.00	No
1/19/78	36673		NA	TRICHLOROETHANE	22.00	Yes
3/9/78	37280		NA	TRICHLOROETHANE	22.00	Yes
3/9/78	37280		NA	RECLAIMED CHLOROTHENE	15.00	No
3/31/78	37956		NA	TRICHLOROETHYLENE	11.00	No
3/31/78	37956		NA	1,1,1 TRICHLOROETHANE	22.00	Yes
4/24/78	38101		NA	TRICHLOROETHANE	14.00	No
4/24/78	38101		NA	TRICHLOROETHANE	22.00	Yes
5/1/78	38109		NA	TRICHLOROETHANE	13.00	No
5/1/78	38109		NA	TRICHLOROETHANE	22.00	Yes
5/5/78	38110		NA	TRICHLOROETHANE	14.00	No
5/5/78	38110		NA	TRICHLOROETHANE	22.00	Yes
5/8/78	38111		NA	CHLOROETHENE	22.00	Yes
5/8/78	38111		NA	CHLOROETHENE	14.00	No
5/15/78	38112		NA	CHLOROTHENE	22.00	Yes
5/15/78	38112		NA	CHLOROTHENE	13.42	No
5/19/78	38115		NA	CHLOROTHENE	13.00	No
5/19/78	38115		NA	CHLOROTHENE	22.00	Yes
5/26/78	38116		NA	CHLOROTHENE	22.00	Yes
5/26/78	38116		NA	CHLOROTHENE	7.00	No
5/26/78	38117		NA	TRICHLOROETHANE	22.00	Yes
5/26/78	38117		NA	TRICHLOROETHANE	12.50	No
6/1/78	38118		NA	CHLOROTHENE	22.00	Yes
6/1/78	38118		NA	CHLOROTHENE	13.00	No
6/9/78	38119		NA	TRICHLOROETHANE	22.00	Yes
6/9/78	38119		NA	TRICHLOROETHANE	11.00	No
6/9/78	38120	7119	NA	RECLAIMED CHLOROTHENE	12.00	No
6/9/78	38120	7119	NA	1,1,1 TRICHLOROETHANE	22.00	Yes
6/13/78	38121	7123	NA	RECLAIMED CHLOROTHENE	13.50	No
6/13/78	38121	7123	na	1,1,1 TRICHLOROETHANE	22.00	Yes
6/22/78	38122		NA	CHLOROETHENE	22.00	Yes
6/22/78	38122		NA	CHLOROETHENE	11.00	No
6/29/78	38127		NA	TRICHLOROETHANE	12.00	No
6/29/78	38127		NA	TRICHLOROETHANE	22.00	Yes
8/3/78	38128		NA	TRICHLOROETHANE	12.00	No
8/3/78	38128		NA	TRICHLOROETHANE	22.00	Yes

Avern TCE Superfund Site: Comprehensive Transaction Report

Run Date: 9/19/97

RP Name: Armstrong Cork Co.

Invoice Date	Order Number	Invoice Number	Manifest Number	Waste Description	Quantity	Cumulative Ranking
8/14/78	38129		NA	TRICHLOROETHANE	9.00	No
8/14/78	38129		NA	TRICHLOROETHANE	15.00	Yes
8/21/78	38130		NA	CHLOROETHENE	12.00	No
8/21/78	38130		NA	CHLOROETHENE	22.00	Yes
9/8/78	39667		NA	TRICHLOROETHANE	25.00	Yes
9/8/78	39667		NA	TRICHLOROETHANE	14.00	No
10/12/78	39668		NA	CHLOROETHENE	10.00	No
10/12/78	39668		NA	TRICHLOROETHANE	22.00	Yes
10/31/78	0		NA	TRICHLOROETHANE	17.00	No
10/31/78	0		NA	TRICHLOROETHANE	28.00	Yes
11/17/78	39683		NA	TRICHLOROETHANE	8.64	No
11/17/78	39683		NA	TRICHLOROETHANE	22.00	Yes
12/27/78	39684		NA	TRICHLOROETHANE	13.00	No
12/27/78	39684		NA	TRICHLOROETHANE	22.00	Yes
1/11/79	39685		NA	TRICHLOROETHANE	16.00	No
1/11/79	39685		NA	TRICHLOROETHANE	23.00	Yes
Total Waste Counted Towards Ranking					575.00	

522.73

① Each drum of Armstrong contained 50 gallons of material. Volume should be reduced from 575 to 522.73

② Recalculate each transaction on this basis

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October 6, 1997

Gary W. Morton (3HW11)
U.S. Environmental Protection Agency
Region III
841 Chestnut Street
Philadelphia, PA 19107

**Re: Malvern TCE Superfund Site (Chemclene Corporation)
258 N. Phoenixville Pike
Chester County, Malvern, Pennsylvania (the "Site")**

Dear Mr. Morton:

I am writing on behalf of Armstrong World Industries, Inc. ("Armstrong") in response to to your September 3 letter to generators that may have sent waste materials to the Site (the "Ranking Letter"). As set forth in detail below, Armstrong challenges the Draft Generator Volumetric Ranking (the "Ranking"), including the specific ranking that is assigned to Armstrong.

Appropriate changes in the ranking methodology should be applied to reduce the number of drums attributed to Armstrong from 575.0 to 312.14. Moreover, because solvents from Armstrong were handled by Chemclene only after August, 1975, Armstrong's ranking should be based only on the remedial costs associated with the Main Plant Area ("MPA"). Any costs connected with the remediation of the Former Disposal Area/Mounded Area ("FDA") should not be attributed to Armstrong.

- 1. The harm at the Site is divisible and capable of apportionment. Therefore, EPA should rank Site users in two rankings using August 1, 1975 as the dividing line.**

Contamination at the Site emanates from two distinct sources resulting in two distinct areas of soil contamination, and two distinct groundwater plumes that do not overlap. The plume and contamination originating at the FDA is associated with wastes that were sent to the Site prior to August 1, 1975. Therefore, parties like Armstrong whose waste was processed at the Site during the period of time after August 1, 1975 are in no way connected to the contamination associated with the FDA. Accordingly, remedial costs at the Site may be apportioned using the model set forth under the Restatement (Second) of Torts (the "Restatement"), and the Superfund cases that have considered applying divisibility to the costs of remediation.

EPA's statements at the December, 1996 PRP meeting in Philadelphia, EPA's comments at the July, 1997 Public Meeting on the Proposed Plan, and EPA's statements in the Ranking Letter, all support ranking generators based on two time periods using August 1, 1975 as the dividing line. In the Ranking Letter, EPA states "EPA considers it likely that the contamination at the Main Plant Area ("MPA") and the contamination at the Former Disposal Area ("FDA") can be separately identified." More importantly, EPA concludes that, in addition to being able to separately identify the contamination, the damages associated with each source are capable of apportionment. EPA states that "it is likely that costs of the remedy can be allocated between the two areas."

Based on the ability to apply divisibility to the remedial costs at the Site, EPA should revise the Ranking to reflect two separate rankings, one for the generators whose waste is associated with the contamination at both the FDA and the MPA, and one for the generators like Armstrong whose wastes went to the Site after August 1, 1975, and therefore, would be connected only with the contamination at the MPA.

Courts that have assessed the role of divisibility under CERCLA would sanction applying divisibility in connection with the Site. For example, in *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252 (3rd Cir. 1992), the Court provided a road map for applying Sections 433A and 881 of the Restatement to a divisibility analysis under CERCLA. Section 433A provides that damages for harm are to be apportioned among two or more causes where: (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm. Section 881 provides that:

If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.

Applying this rule, the Third Circuit found that the critical point in the analysis is "whether a harm is divisible and reasonably capable of apportionment, or indivisible, thereby subjecting the tortfeasor to potentially far reaching liability." *Id.* at 269.

Other Circuits have also endorsed apportioning damages in CERCLA cases where there is a reasonable basis to do so. *See, e.g. In re: Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993), and *U.S. v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

At least one court has considered divisibility at a site, like the Malvern TCE Site, where there were two distinct areas of contamination. In *Kamb v. U.S. Coast Guard*, 869 F. Supp. 793 (N.D. Cal. 1994), where the site was a former rifle range, the District Court for the Northern District of California held:

There is a reasonable basis for apportioning CERCLA liability based on the volume of lead each contributed to the Site and based on the divisibility of the Site into two discrete sections: a trap/skeet range, not used by the defendants, and a firing

range. As a result, joint and several liability should not be imposed upon the defendants.

Id. at 799.

Consistent with the analysis of the Court in the *Kamb* case, the Site is clearly divisible into two discrete sections: the FDA and the MPA. Armstrong and other generators simply did not "use" the FDA as evidenced by the discontinuation of disposal at the FDA after August 1, 1975. Applying the reasoning provided by the Third Circuit in *Alcan*, the harm at the Site is divisible because there are two distinct groundwater plumes that may be remediated as individual operable units. The associated costs are easily apportioned because the parties like Armstrong that used the Site after August 1, 1975, could not have contributed to the harm associated with the FDA. This bright line should be the basis for a new Generator Volumetric Ranking that is based on divisibility.

- 2. The "Drums" attributed to Armstrong should be reduced to 522.73 by considering that Armstrong shipped drums to Chemclene that were only partially full.**

The remedy for the Site is based on the cleanup of contamination caused by the discharge of chlorinated solvents. Water or other impurities in solvent sent to the Site for reprocessing are not the source of the contamination at the Site, and therefore should not be included in ranking a generator. The records underlying the Ranking include data from which the volume of chlorinated solvents sent to the Site by each generator may be determined. Accordingly, EPA should revise the volume attributed to Armstrong under the column of data labeled "Drums All Years" to reflect the actual volume of solvent shipped to the Site by Armstrong. Using a 55 gallon "Drum" as the unit of measurement is reasonable as long as the number of drums attributed to a particular generator accurately reflects the actual gallons of solvent it sent to the Site.

The records of Armstrong's contracts with Chemclene show that Chemclene picked up 55 gallon drums of 1,1,1 trichloroethane (chloroethene) from Armstrong's Lancaster facility. On every Armstrong purchase order it is clear that these drums were only filled only to 50 gallons. Therefore, the 575 drums attributed to Armstrong in the Comprehensive Transaction Report should be recalculated as follows:

$$575 \text{ drums} \times 50 \text{ gallons/drum} \div 1/55 \text{ gallons/drum} = 522.73 \text{ drums}$$

Chemclene's invoices, delivery tickets, and other transaction documentation support this recalculation.

- 3. The number of drums attributed to Armstrong should be further reduced to 312.14 because the drums shipped to Chemclene contained significant volumes of non-solvent materials.**

Chemclene's Reclamation Reports that are tied to each transaction specify the percentage

of solvent reclaimed in each shipment. Therefore, it is possible to calculate the volume of material other than solvent that was contained in any shipment of drums from Armstrong to the Site. Once determined, this "non-solvent" volume should be subtracted from the total gallons of material shipped in a particular batch. Applying this refined methodology, but continuing to use a 55 gallon "Drum" as the unit of measurement, the data for Armstrong under the column labeled "Drums All Years" in the Ranking should be revised as shown on the spread sheet attached hereto as *Exhibit "A"*. Accordingly, Armstrong would be attributed with 312.14 Drums, not 575 Drums.

4. Armstrong's ranking should be reduced by considering the responsibility of Chemclene as the owner/operator/transporter, and the orphan share defined by the period from 1952 to 1968.

a. Owner/Operator/Transporter Share

The Ranking does not include Chemclene even though Chemclene owned and operated the Site, and transported Armstrong's and other generator's recyclable solvents to the Site. Armstrong and other parties listed on the Ranking contracted with Chemclene, and reasonably relied on the fact that Chemclene was licensed by the Commonwealth of Pennsylvania to operate a recycling facility. Even when environmental problems began to emerge, the Commonwealth, and later the EPA, permitted Chemclene to continue operations. Indeed, Chemclene remains in operation today. In consideration of these factors, EPA should state clearly that any liability to be derived from the Ranking, or any future revised ranking, is secondary to the liability of Chemclene.

b. Orphan Share Compensation

In addition to the share of liability that should fall on Chemclene, there is a potentially large orphan share at the Site based on the lack of information concerning generators that dealt with Chemclene during the period from 1952 to 1968. Accordingly, EPA should include amend the Ranking to include the share of liability associated with the, as yet, unidentified generators that used the Site during the period from 1952 to 1968. One method of ranking this share would be estimating the volume sent to the Site during the above period by extrapolating from the data used to prepare the Ranking.

More specifically, in the Ranking, EPA calculated that 30,835.24 Drums were processed at the Site during the period from 1968 through 1993 when Chemclene ceased processing operations. If 30,835.24 Drums were processed over this twenty five year period, and a similar level of activity occurred at the Site during the sixteen year period from 1952 to 1968, it could be estimated that 19,734.55 Drums were processed between 1952 and 1968. Accordingly, because the generators who used the Site in the early years may be eventually identified, the Ranking should be revised to reflect their actual share of the total waste sent to the Site. Applying the above assumption, the post-1968 usage would be sixty one percent (61%) of the total Site usage. Therefore, the shares of all generators currently identified on the Ranking would be revised downward by multiplying by 0.39, the fraction of the total drums that were shipped to the Site before 1968.

Gary W. Morton
October 6, 1997
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Conclusion

The Ranking should be revised to reflect the actual volume of solvent that was transported to the Site from Armstrong. In addition, the Ranking should state that any ranking of generator liability is secondary to Chemclene's liability as the owner, operator and main transporter of waste to the Site. Finally, the Ranking should be revised to identify the orphan share defined by the waste that was processed at the Site during the period from 1952 to 1968.

Armstrong appreciates the opportunity to challenge and otherwise comment on the Ranking. Armstrong hereby incorporates by reference any other comments from any other party that may also apply to Armstrong's position as a generator whose waste is alleged to have been processed at the Site. Because other factors or considerations may be uncovered in the future which could further reduce Armstrong's Ranking, Armstrong reserves the right to raise these issues at the appropriate time.

Very truly yours,
LANGSAM STEVENS & MORRIS LLP


Mark A. Stevens

cc: Douglas Brossman, Esquire

EXHIBIT "A"
Volume Of Recyclable Solvent Processed At Chemclene

Invoice Date	Order Number	Invoice Number	Total Volume In, gallons	Solvent Fraction	Total Solvent In, gallons	Equivalent Drums
1/19/78	36673	6927	1,100	0.567	623.7	11.34
3/9/78	37280	7002	1,100	0.726	798.6	14.52
3/31/78	37956	7020	1,100	0.538	591.8	10.76
4/24/78	38101	7051	1,100	0.637	700.7	12.74
5/1/78	38109	7065	1,100	0.577	634.7	11.54
5/5/78	38110	7071	1,100	0.682	750.2	13.64
5/8/78	38111	7073	1,100	0.653	718.3	13.06
5/15/78	38112	7081	1,100	0.595	654.5	11.90
5/19/78	38115	7091	1,100	0.594	653.4	11.88
5/26/78	38116	7094	1,100	0.344	378.4	6.88
5/26/78	38117	7095	1,100	0.607	667.7	12.14
6/1/78	38118	7102	1,100	0.588	646.8	11.76
6/9/78	38119	7118	1,100	0.559	614.9	11.18
6/9/78	38120	7119	1,100	0.590	649.0	11.80
6/13/78	38121	7123	1,100	0.666	732.6	13.32
6/22/78	38122	7138	1,100	0.499	548.9	9.98
6/29/78	38127	7149	1,100	0.608	668.8	12.16
8/3/78	38128	7187	1,100	0.560	616.0	11.20
8/14/78	38129	7197	750	0.770	577.5	10.50
8/21/78	38130	7203	1,100	0.619	680.9	12.38
9/8/78	39667	7234	1,250	0.650	812.5	14.77
10/12/78	39668	7276	1,100	0.477	524.7	9.54

Invoice Date	Order Number	Invoice Number	Total Volume In, gallons	Solvent Fraction	Total Solvent In, gallons	Equivalent Drums
10/31/78	39669, 70	7298	1,400	0.607	849.8	15.45
11/17/78	39683	7315	1,100	0.464	510.4	9.28
12/27/78	39684	7357	1,100	0.644	708.4	12.88
1/11/79	39685	7376	1,150	0.743	854.5	15.54
TOTALS			28750		17167.7	312.14